NRNH, Inc. d/b/a Jennifer Matthew Nursing and Rehabilitation Center *and* District 1199—Rochester, SEIU, AFL–CIO. Case 3–CA–21861

September 25, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On November 17, 1999, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, NRNH, Inc., d/b/a Jennifer Matthew Nursing and Rehabilitation Center, Rochester, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER HURTGEN, dissenting in part.

I agree with the majority that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire bargaining unit employees of the predecessor employer because they were represented by the Union (District 1199);[1] Section 8(a)(1) by telling employees that they would be represented by a different Union (Hotel Employees Union); and Section 8(a)(5) by refusing to recognize and bargain with District 1199. However, I do not agree that the Respondent violated the Act by setting its initial terms and conditions of employment.

In *NLRB v. Burns Security Services,* 406 U.S. 272 (1972), the Supreme Court stated the general rule that a successor employer has a right to set its initial terms and conditions of employment. I have adhered to that view.[2]

In addition, it is my view that this right is not lost simply because the successor violated Section 8(a)(3) by unlawfully refusing to hire employees of the predecessor.[3] Rather, the 8(a)(3) violations yield their own compensatory remedy of reinstatement and backpay. These 8(a)(3) violations do not impose additional obligations under Section 8(a)(5). While the Board has ruled the other way, and circuit courts have found the Board's position is a permissible one,[4] I continue to believe that the plain language of the Supreme Court's decision in *Burns* points the other way.

Michael J. Israel, Esq., for the General Counsel.
Carl A. Schwarz Jr. and *Matthew J. DeMarco, Esqs. (Schwarz & DeMarco)* of Garden City, New York, for the Respondent.
Michael Harren, Esq. (Chamberlain, D'Amanda, Oppenheimer & Greenfield), of Rochester, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Rochester, New York, on August 30 through September 3, 1999. The charge was filed on April 5, 1999, and the complaint was issued on June 15.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all three parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, NRNH, Inc., a corporation, operates Jennifer Matthew Nursing and Rehabilitation Center, a nursing home, in Rochester, New York. NRNH derives gross annual revenues from this business in excess of $100,000 and purchases and receives at this facility, goods valued in excess of $5000 directly from points outside of the State of New York. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, District 1199-Rochester of the Service Employees International Union (SEIU), is a labor organization within the meaning of Section 2(5) of the Act.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We agree with the judge that the Respondent discriminatorily refused to hire 36 employees of the former Nortonian Nursing Home. Contrary to the judge, however, we do not rely on the Respondent's prehearing offer to the 36 discriminatees of employment in their former positions as evidence of the pretextual nature of the Respondent's explanation for its failure to hire the Nortonian employees.

[1] In finding that the General Counsel established a prima facie case of discriminatory action, I rely on Administrator Harlie Clark's actions in securing a decertification petition, and on Attorney Carl Schwartz Jr.'s remark to Hotel Employees Union Representative Paul Taylor that Respondent did not plan to hire enough of predecessor Nortonian's employees to obligate it to recognize District 1199. I do not rely on the hiring activities of Sandra Dewitt-King.

[2] See my dissent in *Pacific Custom Materials,* 327 NLRB 75 (1998).

[3] Id.

[4] *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460 (9th Cir. 1997); *NLRB v. Staten Island Hotel*, 101 F.3d 858 (2d Cir. 1996); *Pace Industries v. NLRB*, 118 F.3d 585 (8th Cir. 1997); *Canteen Corp. v. NLRB*, 103 F.3d 1355 (7th Cir. 1997); *U.S. Marine Corps. v. NLRB*, 944 F.2d 1305 (7th Cir. 1991).

II. ALLEGED UNFAIR LABOR PRACTICES

At 11 p.m. on Wednesday, March 24, 1999, Respondent, NRNH, Inc., assumed control of the former Nortonian Nursing Home, a 120-bed facility, at 1335 Portland Avenue in Rochester, New York. It renamed the facility Jennifer Matthew Nursing and Rehabilitation Center. The General Counsel alleges that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to recognize and bargain with the Union, which had been certified as the exclusive collective-bargaining representative of a unit of Nortonian's employees and by unilaterally changing the terms and conditions of employment of employees in the unit.

The General Counsel also alleges that Respondent violated Section 8(a)(1) and (3) by refusing to hire 36 employees of Nortonian, in order to avoid having to recognize and bargain with the Union as a successor employer to Nortonian. Finally, the General Counsel alleges that Respondent violated Section 8(a)(1) by informing Nortonian unit members that if they were hired, they would be represented by a labor organization other than the Charging Party at Jennifer Matthew.

A. Events prior to Respondent's Takeover of the Nortonian Nursing Home

On April 28, 1997, the Union was certified as the exclusive collective-bargaining representative of all full-time and regular part-time service employees, maintenance employees, and technical employees, including licensed practical nurses (LPNs) at the Nortonian Nursing Home. Beginning in June 1997 and extending through the end of 1998, the Union and Nortonian met in 18 negotiating sessions but failed to reach an agreement on a contract. Unit employees were tentative members of the Union and were not obligated to pay union dues until a collective-bargaining agreement had been effectuated.

Four individuals, including Anthony Salerno, later the president of Respondent NRNH, entered into an asset-purchase agreement to buy the Nortonian Nursing Home on December 8, 1997. This agreement stipulated that NRNH would assume only contractual liabilities, which it approved in writing prior to the closing date. With regard to Nortonian employees, that agreement provided:

> Although it is contemplated that on the Closing Date most of Seller's employees will become employees of Buyer, it is expressly agreed that Buyer shall have no obligation hereunder to continue to employ any of such employees; provided, however, it is the expectation of the parties that Buyer shall employ John Hansen as Administrator of the Facility on terms and conditions to be negotiated.

During the month of December, Bruce Popper, president of District 1199, spoke with and wrote to Salerno regarding the Union's contract negotiations with Nortonian. Popper requested substantive discussions with Salerno about a number of issues. Salerno did not respond to the Union's letter.

Nortonian, on January 31, 1998, also entered into a consulting agreement with Health Care Associates (HCA), a corporation of which Salerno is also president. Approximately 1 month later, Harlie Clark replaced John Hansen as Nortonian's administrator. Clark was aware of the impending sale from the outset of his employment. In April he attended a meeting of administrators of a number of nursing homes, which were associated with HCA. Anthony Salerno was present at that meeting.

On May 22, 1998, Clark approached Nortonian LPN Eileen Love, who was a member of the Union's contract bargaining committee. He was apparently aware of differences Love was having with other members of the bargaining committee and told Love that a new company wanted to buy Nortonian and give employees wage and benefit increases. He said that the new owners would not be able to do this if the Union was the collective-bargaining representative of the home's employees. Clark suggested that Love circulate a petition among unit employees stating that they no longer wished to be represented by District 1199. Clark told Love how to set up the petition and told her that she needed to collect 53 signatures. On June 7, 1998, Love and three other employees presented the petition to Clark. On June 10, he wrote the Union advising it that he was withdrawing recognition.[1] I infer from the entire record in this matter that Clark solicited this petition at the suggestion of Anthony Salerno.

On June 26, Bruce Popper, president of District 1199, responded to Clark. Citing a June 24, prounion petition presented to Nortonian, Popper demanded rescission of the June 10 notice. Clark filed a representation petition with the NLRB.

In September, shortly before the NLRB representation election, Salerno arrived at Nortonian and held a series of meetings with groups of employees. This is apparently the only visit by Salerno to Nortonian between December 8, 1997, and the takeover of the nursing home on March 24, 1999. I am unable to fully credit either Salerno's account of his remarks or those of Rudean Knight, a housekeeper, who was not hired by NRNH in March 1999. However, it is clear that Salerno told employees that his company was purchasing Nortonian and "that they shouldn't be frightened." Further, from comparing the testimony of Knight and Salerno, I conclude that Salerno told employees that they were underpaid and that his company had a good package to offer them. From this I conclude that the purpose of Salerno's visit was to improve the chances that employees would vote to decertify the Union.[2]

The Union prevailed in the representation election and was certified again as the exclusive bargaining representative of Nortonian unit employees on September 30, 1998. Almost immediately, Salerno asked Lou Attoma, the only active partner of Nortonian, to post a notice at the nursing home to comply with the requirements of the Worker Adjustment and Re-

[1] I credit the testimony of Eileen Love with regard to the initiation of the decertification petition over that of Harlie Clark. For one thing, I see no reason for Love to have undertaken the decertification effort on her own. She was not paying union dues and there was no other benefit that would inure to her unless the Company promised that employees would receive benefits from Respondent as the result of decertification. Moreover, Clark's solicitation of the decertification petition, which I infer was pursuant to direction from Salerno, is consistent with Respondent's conduct throughout its dealings with the Union and Nortonian employees.

[2] Salerno gave a similar speech 1 week prior to a representation election at the Vestal Nursing Center in March 1998.

training Notification Act (WARN), 29 U.S.C. §2101 et. seq. This statute requires the posting of a notice at least 60 days prior to a plant closing or mass layoff. From these conversations, I infer that upon the defeat of the decertification petition, Salerno decided to avoid bargaining with the Union by not hiring a large number of Nortonian employees.

Within days of the NLRB election, Harlie Clark left Nortonian and was replaced as administrator by Aldo Troiani. Troiani was hired by Nortonian's managing partner, Lou Attoma, but was referred to Attoma by Anthony Salerno. Salerno knew Troiani from his tenure at a nursing home in Watertown, New York, with which Salerno's company, HCA, had a consulting contract.

During his employment at Nortonian, Troiani attended monthly meetings of nursing home administrators from other facilities associated with HCA. In December 1998 or January 1999, Salerno called Troiani and told him that he wanted to make the Nortonian administrator's job available to Clark, who was returning from Florida. Salerno offered Troiani a job with an HCA-affiliated nursing home in Albany. On February 1, 1999, Clark returned to Nortonian.

B. Hiring for Jennifer Matthew

On Tuesday, March 2, 1999, Sandra Dewitt-King, the human resources director at Arbor Hill Nursing Home, came to Nortonian with two notices that were posted by Clark. These notices announced the purchase of Nortonian by Jennifer Matthew (NRNH), informed employees they must apply for employment with Jennifer Matthew if they wished to retain their jobs, and that they must be interviewed. Nortonian employees were informed that the interviews would be held at the Holiday Inn at the Rochester Airport on Thursday, March 4, Friday, March 5, and Saturday, March 6.[3] Several employees became upset and asked Clark if this meant they were being fired. Clark responded that everyone was not being fired, "[I]t was a formality, and everyone had to fill out an application and go for an interview."

Arbor Hill Nursing Home is also located in Rochester. Joel Morris, who owns one-third of the shares of Arbor Hill, also own 5 percent of the shares in NRNH. Morris is in charge of the Rochester office and is the principal cash management official of HCA. Some employees at Arbor Hill, including service and maintenance employees, certified nursing assistants (but not LPNs), dietary and housekeeping employees are represented by Local 4 of Hotel Employees and Restaurant Employees Union.

On March 3, 1999, Carl Schwartz Jr., attorney for NRNH called Paul Taylor, the Hotel Employees Union's representative who services the unit at Arbor Hill. Schwartz told Taylor that the owners of Arbor Hill were acquiring Nortonian and asked Taylor if his Union would be interested in organizing the facility. Taylor inquired as to the presence of any other union at the facility. Schwartz told him that Local 1199 were the certified bargaining representative of Nortonian employees. Taylor asked Schwartz if the new owners of Nortonian were going to recognize District 1199. Schwartz responded that they "[H]ad no plans to hire enough people to offer them up recognition."[4] The Hotel workers did not act upon Schwartz' offer and Taylor subsequently informed Bruce Popper of District 1199, of his conversation with Schwartz.

Arbor Hill owner, Morris, directed Sandra DeWitt-King to do the hiring for Jennifer Matthew. She interviewed approximately 110 applicants at the Holiday Inn on 4 days, approximately 100 of whom were Nortonian employees. Approximately 20 Nortonian employees did not apply for work with Jennifer Matthew.

Some employees had to take two buses to get to the Holiday Inn, which is located on the opposite side of Rochester from the Nortonian/Jennifer Matthew Nursing home. Some or all employees were interviewed in a group, then, each had an interview with DeWitt-King that lasted generally between 5 and 20 minutes. At least some employees had to wait as much as 4 hours at the Holiday Inn prior to obtaining their one-on-one interview.

In at least one of the group meetings, DeWitt-King informed the applicants that Jennifer Matthew would be unionized. An employee asked if the union was the same one that represented them at Nortonian. DeWitt-King answered that it was a different union.

When she conducted her individual interviews, DeWitt-King had in front of her one, and in at least some cases, two employment applications that had been completed by each applicant. One application was a "generic Nortonian" application and the other was an application from Avert, a company that performs reference checks for prospective employers.

C. Luis Ralph Lozano's "Failure" to Apply for Work with Jennifer Matthew

Luis Ralph Lozano was working for Nortonian in March 1999, as a maintenance mechanic. He had worked for Nortonian from March 1995 until November 1996, when he was laid off. He returned to Nortonian in July 1998, and been working for the home continuously for about 9 months at the time it was taken over by Jennifer Matthew. He picked up an employment application for Jennifer Matthew but was not interviewed because he was out sick with a case of bronchitis that is documented by a physician's note. While he was off of work he called Harlie Clark, who told him not to worry, that Lozano should simply bring in his application when he returned to work. On March 15, Lozano attempted to give his application to Clark, who told him to hold onto it and that Clark would tell Lozano when he had an interview.

Clark told Lozano that Sandra DeWitt-King had told him that there would be makeup days for employees who missed the March 4–9 interview sessions. He also informed DeWitt-King that Lozano had missed the interviews because of illness and that Lozano had an application for employment.

On March 24, the day of the takeover of Nortonian by Jennifer Matthew, Lozano was apparently told by his supervisor that he no longer had a job. He refused to surrender his nursing

[3] Due to a snowstorm on March 4, interviews were also conducted on Tuesday, March 9.

[4] In crediting Taylor's account of this conversation, I note that it is uncontradicted by sworn testimony.

home keys to her. The supervisor called Harlie Clark, who suggested to Sandra DeWitt-King that she go to the supervisor's office and explain to Lozano why he was no longer employed.

DeWitt-King went to the supervisor's office and told Lozano he didn't have a job anymore because he never applied for one. Lozano reminded DeWitt-King that he had missed the interviews because of illness and reluctantly surrendered his keys. I conclude that Respondent's refusal to accept an employment application from Lozano, its failure to consider him for employment, and its failure to offer him employment were motivated by a desire to avoid successorship status and its resulting obligation to recognize District 1199.

D. The Decision not to Hire the Alleged Discriminatees who were Interviewed

On or about March 23, 45–47[5] bargaining unit employees of Nortonian were informed that, they had been hired by Jennifer Matthew. On that day or the next, the other 35 alleged discriminatees in this case received letters from Sandra DeWitt-King informing them that their positions had been filled.

Sandra DeWitt-King testified that she decided whether or not to hire the Nortonian applicants and that she made these decisions on the following considerations:

> Answers given [during the interviews at the Holiday Inn], body language, other goals that they had for long-term care, their answer to the commitment to a new facility.

DeWitt-King made it quite clear that she generally did not know, nor did she care about such factors as an applicants' length of service at Nortonian and the quality of their work at Nortonian. Indeed, she appears to have gone out of her way not to learn about such matters. I infer that this was part of Respondent's overall plan to arbitrarily limit the number of Nortonian employees it hired so that it could avoid recognizing District 1199.

As set forth below, I find DeWitt-King's testimony generally incredible and indeed preposterous. However, it is quite clear that her testimony is simply an effort on her part to continue to carry out instructions from Respondent's higher-level management.

The first factor that shows the pretextual nature of the reasons advanced by DeWitt-King is that on the first days of operation, March 24–25, 1999, Jennifer Matthew was in some respects understaffed. For example, Respondent did not retain six of the eight Nortonian housekeepers and none of those who worked on the first floor. A day or two after the takeover, Elizabeth Rodriguez observed Administrator Harlie Clark pushing a laundry cart and then folding and putting away clean linen, a task that would ordinarily be performed by a housekeeper.

Immediately after the takeover, at least 60–70 percent of the employees in the nursing department at Jennifer Matthew were "agency" or temporary employees.[6] This was a somewhat higher percentage of temporary employees than prior to the sale. The testimony of Harlie Clark makes it abundantly clear that as a general proposition, it made absolutely no business sense to refrain from hiring a large number of Nortonian employees and operate with such a large complement of temporaries.

Clark testified that when he returned to Nortonian in February 1999, he discovered that HCA or NRNH/Jennifer Matthew was running employment advertisements in the newspaper. That didn't indicate to Clark that the new purchasers were intending to get rid of a large number of Nortonian employees for the following reason:

> The facility was running between, at an estimate of 60 and 70 percent agency. And I know for a fact I was spending around $30,000 a month on agency alone. I just think any good businessman was probably going to try to get positions filled because usually the rule of thumb is if you're spending $30,000 on agency, you pay $15,000 on salaries.

Despite this, the percentage of temporary employees increased immediately after the sale. By late April the number of temporary employees at Jennifer Matthew began to drop and by mid-May there were virtually no temporary employees at the facility. The irrationality of Respondent's hiring procedures in March, is further established by the following exchange between myself and Clark:

> Judge Amchan: If you've taken over a nursing home, and you have 60 to 70 percent agency people, and you have a lot of people who are already working there applying for positions, what business sense does it make not to accept them?
>
> The Witness: I don't know. I did not have anything to do with the hiring.
>
> Judge Amchan: From your perspective as someone in the industry, does it make any business sense to have applicants who are already working there who are regular employees to apply and not take them and maintain 60 to 70 percent agency?
>
> The Witness: Honestly, no, it doesn't make sense.[7]

There remains the possibility that the Nortonian applicants were so inferior that it made sense to continue operating Jennifer Matthew with temporary employees until Respondent could find employees who were better. However, Respondent offered no evidence that any of the replacements hired were superior to the Nortonian applicants it rejected.[8]

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[5] Comparing GC Exhs. 13 and 28, I count 47 names on both lists.

[6] Of the 19 Nortonian LPNs, 17 applied for work with Jennifer Matthew and 12 were hired. The seven who did not apply or were not hired were not immediately replaced. Their jobs were apparently, performed by temporary employees. Of 36 CNAs, 30 applied and 23 were hired. The 13 CNAs who did not apply or were not hired were replaced by 4 new inexperienced CNAs on March 25. One must assume that the duties of the other nine Nortonian CNAs who were not replaced were also performed by temporary employees.

[7] Clark's testimony is consistent with Respondent's September 1998 response to the Finger Lakes Health Systems Agency, promising to reduce the number of temporary employees at the nursing home, see CP Exh. 2, par. 7.

[8] Of the Nortonian dietary aides, 7 of 13 applied for a job with Jennifer Matthew and none were hired. Many of these employees were earning $5.25 per hour. On March 25, they were replaced by eight

E. The Reasons Advanced by Respondent for not Hiring Individual Nortonian Applicants.

To begin with, I find Sandra DeWitt-King's explanation of her reasons for not hiring the individual discriminatees to be incredible. DeWitt-King testified without notes about each of the 35 whom she interviewed. In stark contrast to her total recall of the individuals and their interviews with her in March, stands the fact that on March 30, she could not recall the positions for which she hired a number of the Nortonian employees who were retained. For this reason, I conclude that DeWitt-King simply made up an explanation for rejecting many of the discriminatees.

Whatever remaining doubts one has about the falseness of her testimony, is dispelled by an examination of the reasons she gave for not retaining certain individuals. First of all, the record is quite clear that DeWitt-King, despite almost daily visits to Nortonian in March, never made any attempt to find out which Nortonian employees were doing a good job and which were not. This is further evidence of an alterior motive—arbitrarily limiting the number of Nortonian employees hired to avoid successorship status.

F. The Failure to Hire Certified Nursing Assistant Maria Lopez

No individual's case so clearly shows the pretextual nature of Respondent's failure to hire 36 Nortonian employees, as does the case of Maria Lopez. Lopez worked for Nortonian for over 11 years as a certified nursing assistant. In November 1998, she was promoted to senior aide. When I asked Harlie Clark for his opinion of Maria Lopez as an employee, he responded, "She gave very good care."

Lopez was an active member of the Union's bargaining committee and in her group interview in March Lopez asked Sandra DeWitt-King if the Union that was going to represent employees at Jennifer Matthew was the same Union that represented employees at Nortonian.[9]

DeWitt-King also interviewed Lopez individually for about 10 minutes. She asked Lopez why she wanted to be a certified nursing assistant. Lopez responded by telling her that she chose this career initially because of her experiences with her handicapped son. DeWitt-King asked Lopez to tell her a little about herself. Lopez told her that she was a single mother of three, that she had been working since 1975, and that she had been certified for 10 years.

DeWitt-King told Lopez she'd be notified by mail if she had been hired and that if she was hired she would be paid $9.52 per hour, $1.20 per hour more than what she was earning at Nortonian. On the afternoon of March 24, a few hours before the takeover of the facility by Jennifer Matthew, Lopez went to see DeWitt-King in a third-floor conference room. She asked what was going on with her position. DeWitt-King looked in a folder and told her that her services were no longer needed. Lopez asked why. DeWitt-King responded that she had nothing to do with it, that's just what the papers show.[10]

Before leaving the facility Lopez stopped by Harlie Clark's office. Clark told Lopez he had nothing to do with the decision not to hire her. He also told her that he didn't understand why she wasn't hired because she was a good worker.

At hearing, Sandra DeWitt-King offered the following explanations for Respondent's decision not to hire Maria Lopez. First, she said that Lopez was somewhat disgruntled. However, she also said that all of the employees were disgruntled and admitted that they may have been so because they had been kept waiting for an interview for several hours. Moreover, DeWitt-King did not say that Lopez was any more disgruntled than Nortonian employees she may have hired. DeWitt-King continued:

> I made my decision based on Mrs. Lopez because she told me I had been there for ten and a half years. I've been working there a long time. I've done everything there…and she started to ramble on, and didn't answer any questions that I directed to her as far as what do you feel you have to contribute to Jennifer Matthews. She did tell me at one point. . . I [Lopez] wrote it all down…
>
> I was looking at a rehab setting for Jennifer Matthews, at least that was what I was informed the facility would be, and she basically stated that she'd worked with just long-term residents, and that's where her heart was just in long-term care, and that she wasn't really. . . .knew a lot about rehab services. . . (Tr. 406–407)[11]

Later DeWitt-King denied that she rejected Lopez because she didn't think Lopez could change from dealing with long-

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employees hired at the minimum wage. There is no evidence as to why the eight replacements were more desirable employees than the seven discriminatees. Of the Nortonian housekeepers, eight applied and two were hired. Jennifer Matthew did not replace the housekeepers with permanent employees immediately. Their jobs were performed either by temporary employees or managers. All three Nortonian porters applied for work with Jennifer Matthew and none were hired. The initial group of replacements from Arbor Hill did not include any porters. All three Nortonian cooks applied for a job with Respondent and none were hired. Two cooks were transferred from Arbor Hill on March 25. As with the dietary aides, there is no evidence as to the relative merits of the replacements compared to the discriminatees.

[9] Another reason for discrediting Sandra DeWitt-King is her contradictory and internally inconsistent testimony about a number of subjects, including when she became aware of the fact that District 1199 represented Nortonian employees. Her various responses include: ". . . . I do recall Mrs. Lopez asking a question regarding the Union. She did inquire if it was a Union coming there with them, and I did tell her as far, to my knowledge, there would be a Union representing Jennifer Matthews."

She wanted to know what Union was it, I said at this time, I really don't know, but there would be a Union. She says well, is it 1199. I says I don't know if it's going to be 1199 . . . . (Tr. 405).

At Tr. 529–531, however, DeWitt-King testified that she didn't understand what Lopez meant when she started talking about her union and that she didn't know that Nortonian workers had a union until about March 15 [impliedly after she had decided to hire other applicants instead of Nortonian employees].

[10] With regard to all differences in their accounts of their conversations, I credit Lopez, who I find to be a completely credible witness over DeWitt-King, who I find to be a completely incredible witness.

[11] Respondent's contention that it rejected some of the Nortonian employees because they didn't fit into its plans to provide rehabilitation and other services is belied by the fact that as of early September 1999, it was still providing only long-term care.

term care patients to dealing with subacute patients.[12] Instead she said that Maria Lopez was not hired for the following reasons:

> From her interview process, I made a decision due to the answers that she gave, due to her constantly talking about personal issues in her life about a family member (Tr. 525).

Instead of Maria Lopez, Jennifer Matthew hired the following four certified nursing assistants: Christine Lampley, who had less than a year's experience working in a health care setting; Elizabeth Alvarez, who had less than a year's experience as a CNA; Charlene Coleman, who also had been certified less than 1 year; and Brandy Murray, who also had been certified for less than a year. DeWitt-King's testimony that she thought these individuals were more qualified than Lopez is belied by the fact that she hired them at $8 per hour, while she paid a more experienced Nortonian CNA, Kelly Benman, $8.26 per hour.

Finally, the pretextual nature of DeWitt-King's testimony is indicated by the fact that on August 12, 1999, 3 weeks before the hearing in this matter, Respondent offered all 36 alleged discriminatees, including Maria Lopez, employment in their former positions at Jennifer Matthew.

G. Respondent's Decision not to Hire Other Nortonian Applicants.

At the risk of belaboring the point, it is worthwhile to look at DeWitt-King's explanation for her failure to hire other members of the Nortonian bargaining unit, for whom, unlike Maria Lopez, there is little evidence of union activity. The pretextual nature of these explanations indicates that these decisions were motivated by a desire to avoid successorship status rather than animus towards union activity on the part of particular individuals.

1. Julie Ann Coyle

DeWitt-King testified that she decided not to hire LPN (licensed practical nurse) Julie Ann Coyle because she came into her interview angry, was loud, and was overly concerned with keeping the schedule she had at Nortonian. Despite this, the very night that Coyle received a letter saying that her position had been filled at Jennifer Matthew, DeWitt-King called her to offer her a job as an LPN at Arbor Hill.

2. Genevieve Dorsey

According to DeWitt-King, LPN Genevieve Dorsey, was not hired by Jennifer Matthew because she said in her interview that she was going to resign anyhow because she was not happy. DeWitt-King testified that Dorsey told her that she only came to the interview because she had to do so. This testimony makes no sense because Dorsey did not have to come to the interview; indeed about 20 Nortonian bargaining unit employees did not go to the Holiday Inn to be interviewed. The fact that Dorsey filled out an application and waited hours for an interview is inconsistent with a lack of interest in retaining her job. Finally, DeWitt-King's testimony is belied by the fact that she hired Dorsey to work at Arbor Hill, starting on April 1, 1999.

3. Bertha Henderson

According to DeWitt-King, CNA Bertha Henderson, who had worked for Nortonian for 13 years, was not hired because she complained about not receiving a pay increase. In concluding that Respondent's stated reason for not hiring Henderson is pretextual, I note that Henderson had good reason to complain since Nortonian employees had not received a pay increase in about 5 years.

4. Eileen Love

Respondent contends that LPN Eileen Love was not hired because she abandoned her job at Arbor Hill in 1991. First of all, Respondent has not established that Love quit without giving proper notice. Moreover, Love, who was not an LPN at Arbor Hill, had been employed continuously at Nortonian since 1991 and had received an award for longevity and quality of care. Her performance evaluations at Nortonian were good ones.

5. Adele Presha

DeWitt-King claims to have decided not to hire Adele Presha, a CNA, due to a lack of experience. Presha's employment application indicates that she had been working at Nortonian as a CNA since June 2, 1997. Respondent's contentions with regard to Presha are belied by the fact that it hired a number of CNAs with less than 1 year of experience.

6. Elizabeth Rodriguez

Sandra DeWitt-King testified that she did not hire CNA Elizabeth Rodriguez for Jennifer Matthew because her job at Nortonian was a second job and she didn't see any potential for long-term employment. Despite this, on March 16, 1999, DeWitt-King offered Rodriguez a job as a CNA at Arbor Hill with the same hours, same salary as she was working at Nortonian. Rodriguez told DeWitt-King she applied for a job at Jennifer Matthew, not Arbor Hill. DeWitt-King replied that "her hands were tied." Rodriguez declined the offer at Arbor Hill.

H. Respondent's Operation of Jennifer Matthew After its Takeover of Nortonian; the Union' s Demand for Recognition and Respondent's Response.

During the first week of Jennifer Matthew's operation of the former Nortonian Nursing Home, the staff cared for the same patients that had been cared for prior to the takeover, There were virtually no changes in the way the home operated. Harlie Clark remained at the facility as administrator.[13] Virtually all the supervisors were the same as under Nortonian and 47 of the

[12] Such a contention would be clearly false as demonstrated by the fact that on March 28 and 29, Jennifer Matthew advertised in the newspaper for "RNs, LPNs, & CNAs *for its long term care units* (emphasis added)."

[13] I infer from the record that Anthony Salerno played a significant role in Clark's return to Nortonian in February 1999 and that there was never any doubt in the minds of Clark or anyone else associated with Respondent that Clark would remain as administrator. His application and interview was a charade. Unlike other employees, Clark was interviewed by Sandra DeWitt-King at Nortonian. Nobody else was interviewed for the position and I infer nobody else was ever considered.

74 employees in positions comprising the Nortonian bargaining unit were former Nortonian employees.[14]

Between 21 and 25 of the bargaining unit positions were filled by individuals transferred from Arbor Hill. Some or all of these employees were hired on or about March 15, trained at Arbor Hill, and then transferred to Jennifer Matthew during its first week of operation.[15] Jennifer Matthew advertised in the newspaper for LPNs and CNAs on March 28 and 29 and April 4. However, former Nortonian employees constituted a majority of the employees in the former Nortonian bargaining unit positions until mid-to-late April.

On March 26, 1999, Union President Bruce Popper wrote to Anthony Salerno, demanding recognition and requesting that they meet for the purpose of collective bargaining. Five days later, Carl Schwartz Jr. responded on behalf of Salerno. Schwartz, in rejecting Popper's requests, stated that the Jennifer Matthew staff was not materially the same as the staff at Nortonian and that the Nortonian bargaining unit no longer existed.

I. Evidence Regarding the Supervisory Status of LPNs at Jennifer Matthew

During the interview sessions at the Holiday Inn, Sandra DeWitt-King told at least some of the LPNs that they would no longer be in the Union because they would be considered supervisors. Since I find DeWitt-King to be an incredible witness I do not find that she made it clear to the Nortonian LPNs that if they accepted a job at Jennifer Matthew they would do so on condition that they would be responsible for directing the work of other employees and/or disciplining and evaluating the performance of other employees. DeWitt-King gave at least some Nortonian LPNs a job description.[16] It has not been established that this job description, which is not in evidence, described the duties of a Jennifer Matthew LPN in such a way that they would be deemed to be statutory supervisors.[17]

At hearing, Respondent introduced several documents through Sandra DeWitt-King in an effort to establish that LPNs at Jennifer Matthew are supervisors. Although I admitted these documents into the record over objections as to relevance, I find they are of very little probative value with regard to the question of whether these LPNs exercise independent judgement sufficient to deem them statutory supervisors. These exhibits constitute classic hearsay evidence, i.e., out-of-court declarations not subject to cross-examination with respect to the matter for which they were introduced.

For example, Exhibit R–3 is an evaluation for CNA Frank Garcia dated June 6, 1999. LPN Barbara Cobb's name appears on a line entitled "evaluated by." However, a narrative of Garcia's performance was written by an RN and it is not at all clear the extent, if any, to which Barbara Cobb exercised independent judgement in evaluating Garcia and what use Respondent made of her opinion. Similarly, two disciplinary forms dated July 9, 1999, are signed by two LPNs, but each one is also signed by two registered nurses.

III. ANALYSIS

A. Respondent was a Successor Employer to Nortonian Nursing Home and Therefore Obligated to Recognize and Bargain with District 1199

An employer, which buys the unionized business of another employer, succeeds to the collective-bargaining obligation of the seller if it is a successor employer. For it to be a successor employer, the similarities between the two operations must manifest a "substantial continuity between the enterprises" and a majority of its employees in an appropriate bargaining unit must be former bargaining unit employees of the predecessor. The bargaining obligation of a successor employer begins when it has hired a "substantial and representative complement" of its workforce. *NLRB v. Burns Security Services,* 406 U.S. 272 (1972); *Fall River Dyeing Corp. v. NLRB,* 482 U.S. 27 (1987), affg. 775 F.2d 425 (1st Cir. 1985).

In determining whether such substantial continuity exits, the Board generally considers whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products and has basically the same body of customers.

In applying these factors to the instant case, it is clear that Jennifer Matthew is the successor of Nortonian. The two entities engaged in the same business, long-term nursing care. On March 25, 1999, Jennifer Matthews' employees provided this care to the same patients they had cared for the day before under Nortonian in the same building under almost all of the same supervisors. Their job situations were essentially unaltered. It is also undisputed that as of March 25, 1999, that a majority of the employees hired by Jennifer Matthew had been represented the day before by District 1199. This would be so even if one accepts Respondent's contention that the licensed practical nurses were no longer bargaining unit members.[18]

In its initial response and position statement to the NLRB, Respondent asserted that it was not a successor employer because it hired less than 51 percent of the Nortonian employees. Faced with an obvious misreading of the legal standard, NRNH now argues that its initial permanent workforce of 73 or 74 employees was not a "representative complement" of its workforce under the criteria set forth by the Supreme Court in *Fall River Dyeing Corp. v. NLRB,* supra, because Respondent was still in the process of hiring many permanent employees. Re-

[14] The only statutory supervisor not hired by Jennifer Matthew appears to be Registered Nurse Barbara Blank. For some or most of the former Nortonian employees, their shifts and floor assignments remained unchanged and for some, even their coworkers were largely unchanged.

[15] There is no evidence that any of these employees had worked for Arbor Hill longer than 2 weeks. Fourteen were hired by Jennifer Matthew at the minimum wage of $5.15 per hour.

[16] LPNs at Arbor Hill are excluded from the bargaining unit by the unit description in the collective-bargaining agreement between Arbor Hill and the Hotel and Restaurant Workers.

[17] Julie Coyle didn't notice any differences between the duties in the job description she was provided at her interview and her duties at Nortonian.

[18] If you subtract the 12 LPNs who were working for Jennifer Matthew on March 25, the Union represented 34 or 35 out of 61 or 62 bargaining unit employees.

spondent argues that it did not reach a "representative complement" until May, at which time former Nortonian employees were in the minority of the former bargaining unit.

I reject this argument and conclude that Respondent has been in violation of Section (8)(a)(1) and (5) since March 1999. The *Fall River* decision itself indicates that Respondent's contention is incorrect. In that case the Court rejected the employer's contention that the union's majority status could reasonably be determined only when a full compliment of employees had been hired. In *Fall River*, the union made its demand for recognition in mid-January 1983. The Supreme Court ruled that the Board properly found that Fall River had an obligation to bargain with the union as of this date because the company had hired employees in virtually all job classifications, had hired at least 50 percent of those it would ultimately employ in the majority of those classifications, and employed a majority of the employees it would eventually employ when it reached a full complement of employees. It rejected the employer's contention that a representative complement was not achieved until it hired a sufficient number of employees to expand from one shift to two shifts in April 1983 (when employees formerly in the predecessor's unit no longer constituted a majority of Fall River's employees).

In the instant case, Jennifer Matthew was in "full production" at the moment in assumed control of the Nortonian nursing home. It had hired employees in virtually all job classifications and had hired at least 50 percent of those it would ultimately hire in those classifications. The fact that it was continuing its recruitment process does not mean that a "substantial and representative complement" had not been achieved on March 26, when the Union demanded recognition, see, *Houston Bldg. Service,* 296 NLRB 808 (1989), enfd. 936 F.2d 178 (5th Cir. 1991).

Jennifer Matthew continued to rely on a high percentage on temporary employees just as Nortonian had done. Indeed, Respondent was operating with a full complement of employees when the Union made its demand. If it had not being doing so, it would have been in violation of its representations to the State of New York that it would have sufficient staffing to provide adequate nursing care to Nortonian's patients when it assumed control of the facility.

Justice Brennan noted in *Fall River* that the expansion to two shifts was contingent on the growth of the employer's business. He thus indicated that the Board acted reasonably in concluding that the obligation to bargain should not be delayed until it is determined whether or not the successor reaches the limits of its initial hopes regarding the scope of its business. By analogy, the achievement of a full complement of permanent employees by Jennifer Matthew was contingent on whether it would be able to find suitable employees for permanent employment.

Finally, even if Respondent did not have a "substantial and representative complement" of its workforce until May, it has been in violation of Section 8(a)(1) and (5) since March for refusing to recognize and bargain with the Union. This is so because Respondent violated Section 8(a)(1) and (3) in refusing to hire the 36 alleged discriminatees. If it had not discriminatorily denied employment to Nortonian unit members, it would have had a "representative complement" of its workforce on March 25, by any reasonable standard.[19]

B. Respondent Violated Section 8(a)(1) and (3) in Refusing and Failing to Hire the 36 Alleged Discriminatees.

Wright Line, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (lst Cir. 1981), cert. denied 455 U.S. 989 (1982), provides the appropriate overall analytical framework for violations like the Respondent's discriminatory hiring plan, which in this case was implemented to avoid *Burns* bargaining obligations, *Galloway School Lines,* 321 NLRB 1422 (1996). Pursuant to *Wright Line,* the General Counsel must show that a desire to avoid recognizing and bargaining with the Union was a substantial factor in the employer's hiring decisions. He has done so in the instant case.

To establish discriminatory motivation, the General Counsel must show that the alleged discriminatees were represented by the Union and that Respondent was aware of that fact. The General Counsel must also demonstrate that the new employer bore animus towards the Union and that its failure to hire the alleged discriminatees was motivated by such animus or hostility.[20] Inferences of knowledge, animus, and discriminatory motivation may be drawn from circumstantial evidence as well as from direct evidence.[21] Once the General Counsel has met this prima facie burden, the burden of persuasion shifts to the employer to prove its affirmative defense that it would not have hired these employees for nondiscriminatory reasons. *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (lst Cir. 1981).

In the instant matter, it is undisputed that NRNH was aware that Nortonian employees were represented by District 1199. Animus is established by both direct and circumstantial evidence. Sufficient direct evidence of animus and discriminatory motivation is provided by Carl Schwartz' statement to Hotel Workers Representative Paul Taylor. Before Jennifer Matthew began hiring, Schwartz told Taylor that it did not plan to hire enough Nortonian employees to obligate it to extend recognition to District 1199. Overwhelming circumstantial evidence of animus and discriminatory motivation is provided by the pretextual nature of Respondent's explanation for its failure to hire the 36 alleged discriminatees and its unwillingness to consider Luis Lozano for employment.

Circumstantial evidence also establishes that soon after he entered the asset purchase agreement with Nortonian, Anthony Salerno decided that he would not do business with District 1199. Everything that came after that, the decertification effort

[19] In its brief, the Company states, "[E]ven if all of the alleged discriminatees were added in, the Union would not have represented a majority of the Jennifer Matthew workforce." This overlooks the fact that if the 36 discriminatees had been hired, one would assume that 36 replacements would not have been hired. Thus, using Respondent's figures at p. 7 of its brief, 77 of its employees would have been former Nortonian unit members in May and 42 employees in the former unit would not have been ex-Nortonian workers.

[20] Animus in the context of the instant case is simply Respondent's determination not to recognize and bargain with the Union.

[21] *Flowers Baking Co.,* 240 NLRB 870, 871 (1979); *Washington Nursing Home, Inc.,* 321 NLRB 366, 375 (1966); *W. F. Bolin Co. v. NLRB,* 70 F.3d 863 (6th Cir. 1995).

in the summer of 1998, his visit to Nortonian just before the NLRB election in September 1998, his request to Nortonian that it post a WARN notice, and the discriminatory hiring plan were undertaken pursuant to that decision.[22]

Respondent has offered no credible evidence to rebut the General Counsel's prima facie case. I have found incredible its testimony as to why it did not hire the alleged discriminatees. Moreover, it has not offered any credible evidence as to a nondiscriminatory reason for preferring the employees it hired instead of the discriminatees. NRNH violated Section 8(a)(1) and (3) with regard to each of these 36 Nortonian employees.

NRNH is a "perfectly clear" successor of Nortonian and thus was not entitled to change the terms and conditions of its employees without bargaining with the Union.

A successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor. However, the Supreme Court in *Burns* also stated that:

> [t]here will be instances in which it is perfectly clear that the new employer plans to retain all the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms.

In *Galloway School Lines,* supra, the Board held that the duty to bargain over initial terms applies not only in situations in which the new employer's plan is to retain virtually every predecessor employee, but also in cases where, although the plan is to retain a fewer number of employees, it is still evident that the union's majority status will continue.

Moreover, in *Galloway* the Board, in resolving the uncertainty of whether a new employer, absent its unlawful conduct, would have been entitled to set initial employment terms, held that it would resolve this uncertainty against the wrongdoer, even where certain of the predecessor's employees were not hired lawfully. In the instant case, if these uncertainties are resolved against NRNH, it would have employed 83 of the 103 Nortonian bargaining unit members on March 25.[23] Moreover, since one must assume that none or almost none of the replacements would have been hired but for the discrimination, 100 percent (or close to it) of the bargaining unit employees at Jennifer Matthew on March 25 would have been former Nortonian unit members. From these statistics, the instant matter is a particularly appropriate one in which to apply the *Galloway* principle. I therefore conclude that NRNH violated Section 8(a)(1) and (5) in making changes in the employment conditions of bargaining unit employees without first bargaining with the Union.[24]

Respondent could not change the duties of the LPNs so as to make them statutory supervisors without first bargaining with the Union. Moreover, it has not established that it has done so.

Although Sandra DeWitt-King told at least some LPNs that they would be supervisors if they were hired by Jennifer Matthew, this does not establish that NRNH set initial terms of their employment that would make them supervisors—assuming that it could legally do so. "Supervisor" is defined in National Labor Relations Act as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

The fact that DeWitt-King said that LPNs would be supervisors does not mean that they would be unless their duties changed in a manner that they became supervisors under the prevailing case law. There is no evidence that anyone from Respondent told the LPNs specifically how their duties would change prior to the time they began working for Jennifer Matthew. Therefore, I find that Respondent did not set initial terms of employment that made its LPNs supervisors.

At the hearing, Respondent attempted to show by hearsay evidence that the LPNs exercised supervisory duties sometime after they began working for Jennifer Matthew. The evidence does not prove this contention and Respondent would have violated Section 8(a)(1) and (5) if it changed the LPN's terms of employment after they began working for Jennifer Matthew without bargaining over these changes with the Union. I therefore conclude that the LPNs at Jennifer Matthew remain bargaining unit employees.

Respondent has not established that the former Nortonian bargaining unit is no longer appropriate due to Jennifer Matthews' relationship with Arbor Hill Nursing Home.

The General Counsel has devoted 2-1/2 pages of its brief to rebutting what it believes to be Respondent's contention that the former Nortonian bargaining unit employees are now part of the Arbor Hill bargaining unit. Respondent raised no such argument in its answer and it is not clear that it makes such a contention. However, its brief does at times allude to such an

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[22] I find it unnecessary to determine whether Harlie Clark was an "agent" of Respondent when he solicited the decertification petition in 1998. I infer that he did so at the suggestion of Anthony Salerno because he invoked the "new owners" when soliciting Eileen Love to initiate the decertification petition. Moreover, there appears to be no reason that Nortonian, which was selling the facility, or Clark, as an individual, would have any particular motive to get rid of the Union. On the other hand, the evidence shows that Salerno wanted desperately to avoid dealing with District 1199.

I do not credit the testimony introduced by Respondent to show that it had little or no control over what went on at Nortonian prior to March 24, 1999. That Salerno had a great deal of control over Nortonian's operations even prior to the sale is established, for example, by the fact that he called Aldo Troiani, who was not looking for another job, and indicated that he wanted to replace him at Nortonian with Clark. Further, I credit the testimony of Bruce Popper that at a contract negotiating session in December 1998, Troiani told Popper that he was a member of "the Salerno group" and that he expected to be the administrator of the nursing home after the sale was completed.

[23] Comparing GC Exhs. 13 and 28, I find that there were 103 bargaining unit members at the time of the takeover, 47 were hired, 36 were discriminatorily denied employment, 19 were included in the charge but apparently never applied for work with Respondent, and 1, hairdresser Jackie Imburgia, is unaccounted for.

[24] Respondent unilaterally lowered the life insurance coverage for many unit employees, as well as lowering the wage rates for employees in certain positions, such as dietary aides.

argument. At page 6, Respondent states, "[t]hese facilities are not 'stand alone' operations. They have an interchange of employees and human resource functions, and consolidated purchasing power. They also have common ownership and control, in the person of Joel Morris." At page 17, Respondent characterizes the workforces of the two facilities as "merged" and talks about "the resulting accretion of the Jennifer Matthew staff."

Respondent has not rebutted the Board's presumption that single-facility units are appropriate in the health care industry, *Manor Health Care Corp.,* 285 NLRB 224 (1987). As the General Counsel points out, NRNH does not own Arbor Hill and Arbor Hill does not own Jennifer Matthew. The only commonality of ownership is that Joel Morris, who owns 5 percent of the shares of Jennifer Matthew, also owns 33 percent of the shares in Arbor Hill. In addition, Healthcare Associates perform services such as cash management and human resources consulting for both facilities.

Sandra DeWitt-King, the human resource director at Arbor Hill, oversees one human resources coordinator at that facility and a different human resource coordinator at Jennifer Matthew. However, each facility has its own administrator, director of nursing, and other management officials. No Jennifer Matthew employees have been transferred to Arbor Hill and I find that except for new employees who have been trained at Arbor Hill, Respondent has not established that Arbor Hill employees have been transferred to Jennifer Matthew.[25]

Another factor considered by the Board in accretion cases, the collective-bargaining history of the units, also cuts against deeming Arbor Hill and Jennifer Matthew to be one bargaining unit. At Nortonian/Jennifer Matthew, District 1199 has been certified as the exclusive bargaining representative of an appropriate unit twice within 2 years of the takeover by NRNH. Additionally, the bargaining unit at Arbor Hill, from which LPNs have been excluded, has been represented by the Hotel Employees and Restaurant Employees Union since the 1970s.

Employees at Jennifer Matthew have never expressed an interest in being represented by the Hotel Workers Union. Moreover, there is no evidence that the Hotel Workers Union has ever sought to represent employees at Nortonian/Jennifer Matthew. I conclude that the Respondent has not established that Jennifer Matthew has been so integrated into Arbor Hill so as to negate the separate identity of the Jennifer Matthew bargaining unit.

C. Sandra DeWitt-King's Statement to Nortonian Employees in the Interview Process that there Would be a Union at Jennifer Matthew but a Different one than the Union at Nortonian Violated Section 8(a)(1)

I conclude that DeWitt-King's statement to employees that they would be represented by a different union at Jennifer Matthew, violated Section 8(a)(1). It conveyed to them the message that Respondent would not permit them to be represented by a union of their own choosing. Such a message is a clear violation of their Section 7 rights.

[25] I do not credit DeWitt-King's testimony at Tr. 504 that "we use employees together back and forth."

CONCLUSIONS OF LAW

1. Respondent, NRNH, Inc., doing business, as Jennifer Matthew Nursing and Rehabilitation Center, is a "perfectly clear" successor to Nortonian Nursing Home.
2. Respondent has violated Section (8)(a)(1) and (5) since March 26, 1999, in refusing to recognize and bargain with the Union.
3. Respondent has violated Section 8(a)(1) and (5) in making changes to the employment conditions of bargaining unit employees without first bargaining with the Union.
4. Respondent violated Section 8(a)(1) and (3) in refusing and failing to hire the 36 discriminatees.
5. Licensed practical nurses at Jennifer Matthew are not supervisors and remain members of the bargaining unit of which the Union is the exclusive bargaining representative.
6. The former bargaining unit of Nortonian employees continues to exist at Jennifer Matthew Nursing and Rehabilitation Center and continues to be an appropriate bargaining unit.
7. Respondent violated Section 8(a)(1) by telling Nortonian employees that if they were hired by Jennifer Matthew that they would not be represented by the charging party.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily refused employment to the following employees, it must offer each of them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987):

> Lydia Aponte, Joyce Baikum, Julie Coyle, Addie Davis, Gail DeLorenzo, Genevieve Dorsey, Shawana Gibson, Freddie C. Harris, Bertha Henderson, Sheimeka Henderson, Ronnell Jackson, Rudean Knight, Lori Laffin, Cynthia Lewis, Maria Lopez, Eileen Love, Luis Lozano, Juanita Maldonado, Phillip Murray, Tim Murray, Carmen Ortiz, Salete Pacheco, LaDonna Perry, Adele Presha, Darlene Robinson, Elizabeth Rodriguez, Elizabeth Ruiz, Diane Scardino, Tanya Session, Walter Shepard, Juanita Spencer, Harvey Thomas, Patrica Tolbert, Edna Torres, Jaconda Williams, and Gloria Young.

Because of the Respondent's egregious misconduct, demonstrating a general disregard for the employees' fundamental rights, I find it necessary to issue a broad Order requiring the Respondent to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[26]

[26] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be

ORDER

The Respondent, NRNH, Inc., doing business in Rochester, New York, as Jennifer Matthew Nursing and Rehabilitation Center, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to hire bargaining unit employees of Nortonian Nursing Home, the predecessor employer, because of their union-represented status in the predecessor's operation, or otherwise discriminating against employees to avoid having to recognize District 1199-Rochester, Service Employees International Union, AFL–CIO (the Union).

(b) Refusing to recognize and bargain in good faith with the Union as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time service employees, maintenance employees, and technical employees, including licensed practical nurses; excluding all professional employees, business office clericals, guards, and supervisors as defined in the Act.

(c) Unilaterally changing wages, hours, and other conditions of employment without bargaining first with the Union.

(d) Interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act by informing them that would or might be represented by a labor organization other than the Union.

(e) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer the following former employees of the predecessor, Nortonian Nursing Home, employment in their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed:

> Lydia Aponte, Joyce Baikum, Julie Coyle, Addie Davis, Gail DeLorenzo, Genevieve Dorsey, Shawana Gibson, Freddie C. Harris, Bertha Henderson, Sheimeka Henderson, Ronnell Jackson, Rudean Knight, Lori Laffin, Cynthia Lewis, Maria Lopez, Eileen Love, Luis Lozano, Juanita Maldonado, Phillip Murray, Tim Murray, Carmen Ortiz, Salete Pacheco, LaDonna Perry, Adele Presha, Darlene Robinson, Elizabeth Rodriguez, Elizabeth Ruiz, Diane Scardino, Tanya Session, Walter Shepard, Juanita Spencer, Harvey Thomas, Patrica Tolbert, Edna Torres, Jaconda Williams, and Gloria Young.

(b) Make the following employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision:

> Lydia Aponte, Joyce Baikum, Julie Coyle, Addie Davis, Gail DeLorenzo, Genevieve Dorsey, Shawana Gibson, Freddie C. Harris, Bertha Henderson, Sheimeka Henderson, Ronnell Jackson, Rudean Knight, Lori Laffin, Cynthia Lewis, Maria Lopez, Eileen Love, Luis Lozano, Juanita Maldonado, Phillip Murray, Tim Murray, Carmen Ortiz, Salete Pacheco, LaDonna Perry, Adele Presha, Darlene Robinson, Elizabeth Rodriguez, Elizabeth Ruiz, Diane Scardino, Tanya Session, Walter Shepard, Juanita Spencer, Harvey Thomas, Patrica Tolbert, Edna Torres, Jaconda Williams, and Gloria Young.

(c) Recognize and, on request, bargain collectively with the Union as the exclusive representative of the Respondent's employees in the unit above, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed document.

(d) On request of the Union, rescind any departures from terms and conditions of employment that existed immediately prior to Respondent's takeover of the predecessor's nursing home, and make whole the bargaining unit employees by remitting all wages and benefits that would have been paid absent those unilateral changes for which the Union requests rescission, from on or about March 26, 1999, until it negotiates in good faith with the Union to agreement or to impasse. The remission of wages shall be computed as in *Ogle Protection Service,* 183 NLRB 682 (1970), enfd. 444 F. 2d 502 (6th Cir. 1971), plus interest as prescribed in *New Horizons for the Retarded,* supra.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Rochester, New York facility copies of the attached notice marked "Appendix."[27] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 25, 1999.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

adopted by the Board and all objections to them shall be deemed waived for all purposes.

[27] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to hire bargaining unit employees who formerly worked for Nortonian Nursing Home, our predecessor employer, because of their union-represented status in Nortonian's operations, or otherwise discriminate against employees to avoid having to recognize and bargain with District 1199-Rochester, Service Employees International Union (SEIU).

WE WILL NOT discharge or otherwise discriminate against any of you for supporting District 1199 or any other union.

WE WILL NOT inform you that you may, or will be represented by a union which you have not selected as your collective-bargaining representative.

WE WILL NOT refuse to recognize and bargain collectively in good faith with District 1199 as the exclusive bargaining representative in the following appropriate unit:

> All full-time and regular part-time service employees, maintenance employees, and technical employees, including licensed practical nurses; excluding all professional employees, business office clericals, guards, and supervisors as defined in the Act.

WE WILL NOT unilaterally change wages, hours, and other conditions of employment without bargaining about these changes with the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer to the following employees of the predecessor, who would have been employed by us but for our illegal discrimination against them, employment in the positions which they held with our predecessor or, if such positions no longer exist, in substantially equivalent positions, without prejudice to their seniority and other rights and privileges previously enjoyed, discharging if necessary, any employee hired in their place. In addition, WE WILL make whole these employees for any loss of earnings and other benefits they may have suffered by reason of our unlawful refusal to employ them with interest:

> Lydia Aponte, Joyce Baikum, Julie Coyle, Addie Davis, Gail DeLorenzo, Genevieve Dorsey, Shawana Gibson, Freddie C. Harris, Bertha Henderson, Sheimeka Henderson, Ronnell Jackson, Rudean Knight, Lori Laffin, Cynthia Lewis, Maria Lopez, Eileen Love, Luis Lozano, Juanita Maldonado, Phillip Murray, Tim Murray, Carmen Ortiz, Salete Pacheco, LaDonna Perry, Adele Presha, Darlene Robinson, Elizabeth Rodriguez, Elizabeth Ruiz, Diane Scardino, Tanya Session, Walter Shepard, Juanita Spencer, Harvey Thomas, Patrica Tolbert, Edna Torres, Jaconda Williams, and Gloria Young.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the aforementioned bargaining unit.

WE WILL, on request of the Union, rescind any departures from terms and conditions of employment that existed immediately prior to our takeover of the predecessor's nursing home, retroactively restoring preexisting terms and conditions of employment, including wage rates and benefits plans, and WE WILL make whole the bargaining unit employees by remitting all wages and benefits that would have been paid absent such unilateral changes from on or about March 26, 1999, until we negotiate in good faith with the Union to agreement or impasse.

NRNH, INC. d/b/a JENNIFER MATTHEW NURSING AND REHABILITATION CENTER